

IN TERM

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JAMES D. OWEN

Supreme Court of the United States

October Term 1915

No. 386

Caldwell v. Sioux Falls Stock Yards Company

No. 418

Harriok v. Halsey and Company

No. 438

Hall, etc., v. The Geiger-Jones Company

No. 439

Hall, etc., v. Contrap

No. 440

Hall, etc., et al v. Boce, et al

Appeals from the District Courts of the United States
of Michigan, South Dakota and Ohio.

**MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE.**

GRANT FELLOWS,

Attorney General of Michigan

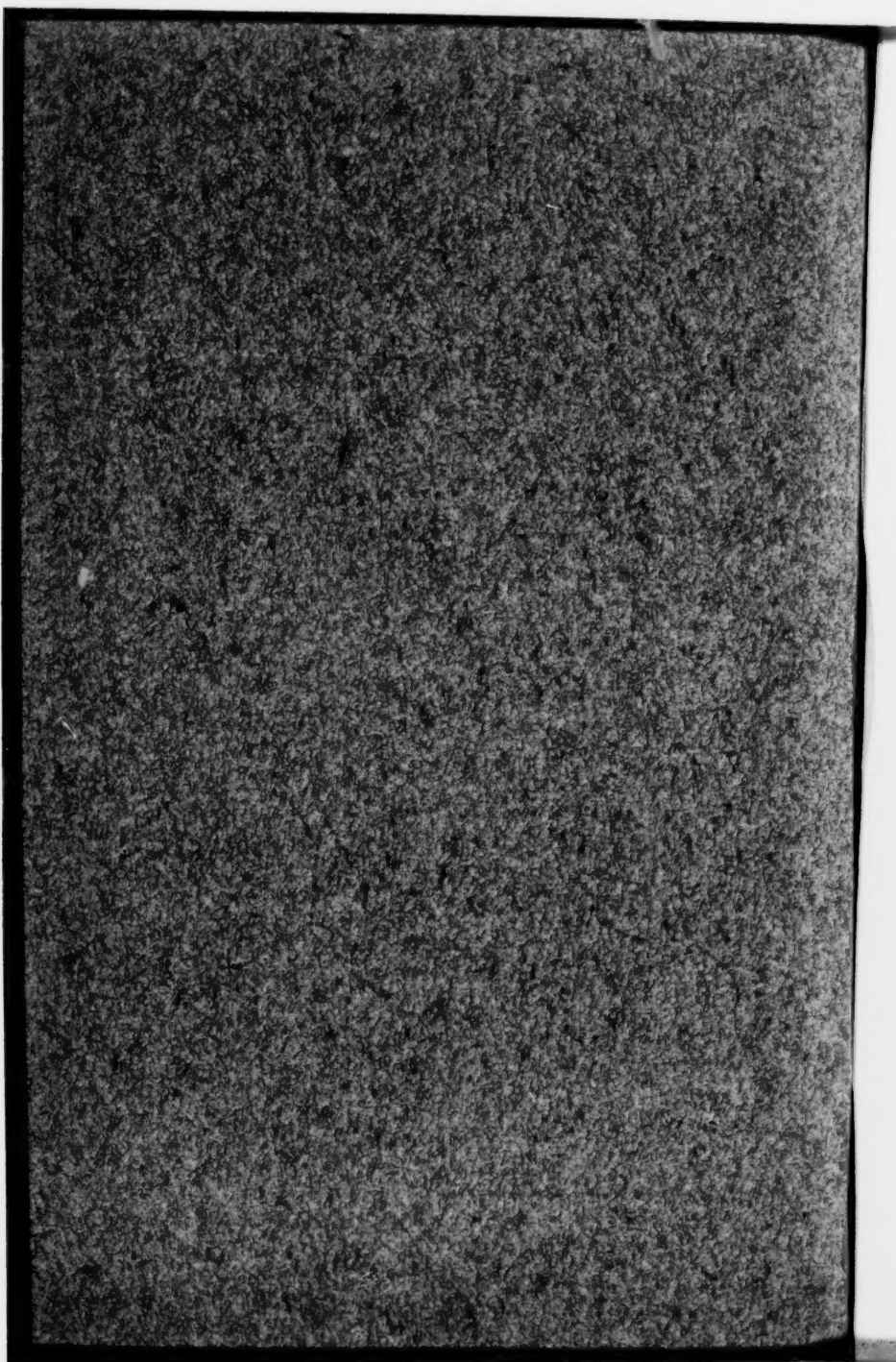
GEORGE COSSON,

Attorney General of Iowa

EDWARD C. TURNER,

Attorney General of Ohio

P. E. TOTHAKER, Law Printer, 10-12 N. Third St., Columbus, O.



IN THE
Supreme Court of the United States

October Term 1915.

No. 860.

Caldwell v. Sioux Falls Stock Yards Company.

No. 900.

Herrick v. Halsey and Company.

No. 941

Hall, etc., v. The Geiger Jones Company.

No. 942.

Hall, etc., v. Coultrap.

No. 943.

Hall, etc., et al v. Rose, et al.

**Appeals from the Districts Courts of the United States
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**MOTION FOR LEAVE TO FILE BRIEF
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Come now Grant Fellows, attorney general of Michigan, George Cosson, attorney general of Iowa, and Edward C. Turner, attorney general of Ohio, as a duly appointed committee of the National Association of At-

torneys General and respectfully seek permission to file a brief in the above entitled causes as amici curiae.

Said causes involve the constitutionality of the so-called Blue Sky Laws of Ohio, Michigan and South Dakota.

More than twenty states have enacted similar legislation.

After the Federal District Courts of Iowa and Michigan had declared the original Blue Sky Laws of Iowa and Michigan unconstitutional, the National Association of Attorneys General appointed a committee to draft a model law. This committee which was composed of Attorneys General Moose of Arkansas, Fellows of Michigan, and Cosson of Iowa, reported a model Blue Sky Law to the National Association of Attorneys General on December 28, 1914. This model has been followed in the laws adopted by a number of the states, including Michigan and South Dakota.

All of said legislation seeks to protect the citizens of the various states from fraud in the sale of alleged securities.

As the decision in any one of the above entitled causes will in all probability be determinative of the validity of similar laws in other states, we respectfully suggest that this committee, appointed for the purpose by Honorable James P. Tuttle, attorney general of New Hampshire, president of the National Association of Attorneys General, be granted permission to file a brief discussing the general principles underlying this class of legislation.

GRANT FELLOWS,

Attorney General of Michigan.

GEORGE COSSON,

Attorney General of Iowa.

EDWARD C. TURNER,

Attorney General of Ohio.

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1915

No.

**SIOUX FALLS STOCK YARDS COM-
PANY**, a Corporation, **WILLIAM MOR-
LEY** and **HARRY MORLEY**,

Plaintiffs and Respondents,

vs.

CLARENCE C. CALDWELL, as Attorney
General for the State of South Dakota
and Ex-Officio Member of the State Se-
curities Commission of the State of
South Dakota; **HARRY O'BRIEN**, as
Insurance Commissioner of the State of
South Dakota, and Ex-Officio Member
of the State Securities Commission of
the State of South Dakota; **JOSEPH L.
WINGFIELD**, as Public Examiner of
the State of South Dakota and Ex-Of-
ficio Member of the State Securities
Commission, and **DAN E. HANSON**, as
State's Attorney of Turner County,
South Dakota,

Defendants and Appellants.

Appeal From the District Court of the United States,
District of South Dakota, Eastern Division.

MOTION TO ADVANCE

Now come the appellants, and move the Court to ad-
vance the above entitled cause for hearing and argument
to an early date convenient to the Court.

In support of the motion to advance appellants re-
spectfully show to the Court:

This action was brought by respondents in the
United States District Court for the District of South
Dakota for the purpose of obtaining a permanent in-
junction against said appellants restraining said ap-

pellants from instituting criminal actions against respondents for violation of Chapter 275, of the Session Laws of the State of South Dakota for the year 1915. An application was made by respondents to the Judge of said Court for a temporary or interlocutory injunction during the pendency of said action. A hearing was had upon the application of respondents for such interlocutory injunction under the provisions of Section 266, of the Act of Congress entitled "An act to codify, revise and amend the laws relating to the Judiciary," approved March 3, 1911, as amended by Act of March 4, 1913 (37 Stat. L. 1013). The Judge of the District Court called to his assistance to hear and determine the application, two other Judges, as provided by said statute, namely, United States Circuit Court Judge Walter H. Sanborn, and United States District Judge Thos. C. Munger, and an order was made in said cause by the said Judges, which granted the application of respondent for an interlocutory injunction, and which restrained appellants from instituting and prosecuting any actions, civil or criminal, against respondents under the aforesaid act of the Legislature of the State of South Dakota, for alleged violations thereof, and from taking any proceedings for the enforcement of said act, against the said respondents. From this interlocutory order of injunction appellants have appealed to the Supreme Court of the United States.

The South Dakota act in question (Session Laws of 1915, page 657) is popularly known as a "Blue Sky Law." It was passed at the 1915 session of the Legislature of South Dakota, was approved March 15, 1915, and went into effect on July 1, 1915. This act creates "A State Securities Commission" to consist of the Public Examiner, the Attorney General and Commissioner of Insurance. It requires every person, corporation, co-partnership, company or association, except those exempted under the provisions of the act, before selling, offering for sale, taking subscriptions for or negotiating for the sale in any manner whatsoever, in the State of South Dakota, any stocks, bonds, investments, contracts or other securities, of its own issue, to make application for a license or permit, and submit certain information and data prescribed by this statute to the said State Se-

curities Commission, and to pay a filing fee prescribed by this statute. The said State Securities Commission shall hear such application, and if in the opinion of such Commission the sale of such contracts, stock, bonds or other securities would work a fraud upon the purchaser, the Commission is authorized to disapprove the sale of same. If, however, said Commission shall not find that the proposed plan of business, or the proposed contracts, stocks, bonds or other securities are fraudulent, or are of such a nature that the sale of such contracts, stocks, bonds or other securities would in the opinion of the Commission work a fraud upon the purchaser thereof, then it is authorized to approve the sale of the same in the State of South Dakota, and issue its certificate to that effect. It is made unlawful for any investment company or dealer or representative thereof, to sell, take subscriptions for or negotiate for the sale in any manner whatever in South Dakota, any stocks, bonds, investment contracts or other securities, unless and until the said Commission has approved thereof and issued its certificate in accordance with the provisions of the statute: Penalties by fine and imprisonment in the county jail are prescribed for violations of the act.

Respondent's Bill of Complaint and Application shows that the complaint, the Sioux Falls Stock Yards Company, is a corporation of the state of Colorado, and that the complainants, William Morley and Harry Morley, are residents and citizens of the State of Iowa. That during the year 1915, both before and after July 1st, of that year, the Sioux Falls Stock Yards Company was engaged in the business of building and constructing a stock yards in the City of Sioux Falls, Minnehaha county, South Dakota, and was engaged at such time in selling certain of its capital stock for the purpose of raising sufficient capital to complete the construction of its said stock yards in the City of Sioux Falls. That the complaints, William Morley and Harry Morley were at such times engaged in the business of selling the stock of the Sioux Falls Stock Yards Company within the state of South Dakota. That in October, 1915, the defendant, Dan E. Hanson, as State's Attorney of the County of Turner, and State of South Dakota, at the instigation and request of the other defendants as members of the

State Securities Commission, caused to be instituted against the complainants criminal proceedings for the violation of the provisions of said Chapter 275, Session Laws of South Dakota for the year 1915, and that the defendants intend and will continue to prosecute the complainants for violations of said statute so long as complainants sell or offer for sale any stock of the Sioux Falls Stock Yards Company within the state of South Dakota. The complainants desire to continue the sale of the securities and stocks of the said Sioux Falls Stock Yards Company within the State of South Dakota, and that the business of said corporation cannot be promoted without the continued sale of its stock. That the acts of defendants under said chapter 275 are depriving complainants of the right to sell the capital stock of said Sioux Falls Stock Yards Company within the State of South Dakota, and deprives them of their property without due process of law in violation of Section 1 of Article 14 of the Constitution of the United States and Section 2 of Article 6, Constitution of the State of South Dakota; that there is thereby denied to the complainants the equal protection of the laws as guaranteed to them by the Fourteenth amendment to the Federal Constitution; that the law imposes a burden upon and practically prohibits interstate commerce, contrary to Section 8 of Article 1, of the Constitution of the United States, and said statutes attempt to vest and delegate to the said State Securities Commission judicial powers unauthorized by law.

The hearing for the interlocutory injunction was had upon the Bill of Complaint, which constituted the showing and application for the complainants. The appellants conceded the correctness of the facts alleged by complainants but contended that same did not constitute grounds for an injunction, thus in effect demurring to the application of complainants. The Court rendered no formal opinion but in the interlocutory injunction Order hereinbefore described, made a finding that Chapter 275, Session Laws of South Dakota for the year 1915, was violative of the Constitution of the United States, basing such finding in the order upon the decisions in *Alabama & No. Transportation Co. vs. Doyle*, 210 Fed. 173, *Wm. R. Compton Co. vs. Allen et al.*, 216 Federal 537, and

Bracey vs. Darst, 218 Federal 482. The issue upon the appeal to this Court as made by the pleadings and record and the decision of the lower Court, is as to the constitutionality under the Federal Constitution of the said South Dakota Statute.

As reason why it is especially urgent and desirable that the cause in this Court be advanced to an early hearing, appellants enumerate the following:

1. That the issues and questions involved in this appeal are matters of public concern to all the people of South Dakota in that they involve the validity of the statute regularly passed and approved, and designed to protect the public against fraud.

2. That public officers of the state are charged with the administration and enforcement of this statute, and such administration and enforcement is seriously embarrassed by the question as to the validity of such statutes raised by the decision of the Federal District Court.

3. That such officers are compelled to take the risk of enforcing an invalid statute, or of allowing a valid statute to remain ignored and unenforced until its validity is determined.

4. That such officers believing in the validity and constitutionality of the statute are insisting upon its enforcement except as they have been restrained by the Court as to the complaints in this case.

5. That investment companies and persons dealing in stocks, bonds and other securities within the State of South Dakota, are being compelled to submit to the provisions of a statute which may be determined to be unconstitutional and void, or to determine for themselves at their peril that same is unconstitutional and void, and take the risk of subjecting themselves to the penalties provided therein.

6. That the situation during the pendency of this appeal, and until the validity and constitutionality of said statute is finally determined, is such as will likely create a multiplicity of suits because of the uncertainty with reference to the validity of the law.

7. That the business of dealing in stocks, bonds and securities of investment companies is very extensive throughout the state of South Dakota; that the number of people engaged in selling stocks and securities of in-

vestment companies is large, all of whom will be directly affected in the determination of the question of the validity of such law. That the business of selling such stocks and securities reaches throughout the entire state in all sections thereof, and extends to all classes of people, and the administration of the law affects the entire people of the state.

8. That more than twenty states of the United States have passed blue sky laws in some form. That the question as to the power of the states to protect its people from fraud in the sale of stocks and securities under these laws is a new question but one of the greatest importance to the people throughout all of these various states. That the demand and need for legislation along this line is shown by the passage of laws to this end in so many states. That it is important and urgent in order to protect the public from fraud that the scope of the authority of the states under the Federal Constitution to legislate along these lines, be determined to the end that power and valid legislation may be secured as far as possible from the states, and to the end that the people, through Congress may supply the needed legislation along these lines where the power to legislate is denied the states.

WHEREFORE, Appellants respectfully submit their Motion together with the foregoing reasons in support thereof.

CLARENCE C. CALDWELL,

Attorney General,

BYRON S. PAYNE,

Asst. Attorney General,

Solicitors for Appellants.

The plaintiffs and respondents in the above entitled action hereby join in the foregoing motion to advance, and respectfully ask that said motion be granted, and they hereby waive all notice of hearing of the same.

R. J. GAMBLE, E. E. WAGNER, and

GEORGE J. DANFORTH,

Solicitors for Respondents.

constitutional and its effect, if the business be continued in disregard of it, will be to visit him with repeated criminal prosecutions involving heavy fines and imprisonment, the remedy at law is not adequate.

A suit to enjoin state officials from instituting criminal proceedings in enforcement of such a statute is not a suit against the State.

Reversed. For decree below see 230 Fed. Rep. 236, note.

THE case is stated in the opinion.

Mr. Clarence C. Caldwell, Attorney General of the State of South Dakota, with whom *Mr. Byron S. Payne*, Assistant Attorney General of the State of South Dakota, was on the brief, for appellants.

Mr. George J. Danforth, with whom *Mr. Hugh S. Gamble*, *Mr. Frank McLaughlin* and *Mr. Edward E. Wagner* were on the brief, for appellees:

The act denies to the appellees due process of law, in violation of the Fourteenth Amendment and the South Dakota constitution, § 2, Article 6.

A complete analysis of its provisions shows that this is not a law to prevent fraud in the sale of stocks and bonds. It is a law designed for the sole purpose of regulating the control of the sale of stocks and bonds to a point of absolute prohibition. The stocks and bonds that are sold under the permit given by the commission are no more protected against the fraud and deceit of the agent in selling them than are those that are sold without a permit. The law is purely an attempt to regulate profit and loss and to try to guarantee the citizens of South Dakota against a possible mistake in judgment. It is simply an effort to prevent the citizens of this State from entering into a legitimate enterprise for gain, if they so desire, and to guard their pocketbooks. The law does not provide any penalty for fraud, but simply contains a prohibition against and provides a penalty for tendering for sale an article of commerce, however honestly it may

be tendered. Herein lies the vice of the statute, and herein does it differ from all laws regulating commercial transactions, which have been upheld by the court under the guise of police regulations.

The State Securities Commission is not merely an administrative board vested with certain discretionary powers, but is rather a court before which evidence must be taken, examined and weighed, and with authority greater than was ever conferred upon any judicial tribunal in this country.

The very right to make a contract is taken away from the individual unless the individual or corporation or association receives the stamp of approval of the commission upon the contract.

For a century or more the business of trading in horses has been recognized as a line of business in which fraud was frequently practiced. There would be just as much sense in having the State Securities Commission put its stamp of approval upon every horse trade as there would be to have it set up its judgment against the skilled investor, simply because an occasional person has lost his money by reason of a stock transaction. *Ex parte Hawley*, 22 S. Dak. 23.

The act is an unlawful interference with interstate commerce. *Catlin & Powell v. Schuppert*, 110 N. W. Rep. 818; *Hatch v. Reardon*, 204 U. S. 152; *International Textbook Co. v. Pigg*, 217 U. S. 91.

The statute denies to the appellees the equal protection of the law. It exempts state and national banks and loan associations and certain other classes.

The act attempts to delegate both legislative and judicial power to the State Securities Commission, and is not an inspection law. *Phoenix Insurance Co. v. Perkins*, 101 N. W. Rep. 1110; *Sioux Falls v. Kirby*, 6 S. Dak. 62; *Hewitt v. Board of Medical Examiners*, 84 Pac. Rep. 39; *Mathews v. Murphy*, 63 S. W. Rep. 785.

In the case at bar, the law distinctly provides that all that is necessary for the Securities Commission to find is that in its opinion the sale of stocks, bonds, etc., might work fraud upon the purchaser. A pure and absolute discretionary power is given to the commission. First, as to the granting of the permit, and, Second, as to the revocation of the permit after it is granted. There is no standard fixed to guide the commission in granting the permit, nor is there any standard prescribed as the reason for the revocation of the permit.

Mr. George Cosson, Attorney General of the State of Iowa, and Mr. Waller C. Owen, Attorney General of the State of Wisconsin, by leave of court, filed a brief as *amici curiæ* on behalf of the National Association of Attorneys General of the United States.

MR. JUSTICE McKENNA delivered the opinion of the court.

This case was argued and submitted with Nos. 438, 439 and 440, just decided, *ante*, 539, and with No. 413, *post*, 568, which concerns a statute of Michigan of like kind, the opinion in which is to follow. It involves the same general questions as those cases and is presented to review a decree of the District Court enjoining appellants from enforcing a statute of the State of South Dakota relating to the sale of securities. The act (§ 23) makes violations of its provisions a misdemeanor and criminal prosecutions under the act were the particular actions of the officers of the State that the appellees prayed to be enjoined.

After a consideration of the pleadings and argument the court, consisting of three judges, expressed the view that the statute violated the Constitution of the United States, and cited in confirmation *Alabama & N. O. Transportation Co. v. Doyle*, 210 Fed. Rep. 173; *Wm. R. Compton Co. v.*

Allen, 216 Fed. Rep. 537, and *Bracey v. Darst*, 218 Fed. Rep. 482.

The court decreed that the appellants be enjoined from instituting and prosecuting any actions, civil or criminal, against complainants (appellees) under the statute for alleged violations thereof, and from taking any proceedings for its enforcement except such as might be deemed proper by them in the criminal actions already pending.

The Sioux Falls Stock Yards Company is a Colorado corporation, having its principal place of business at the City of Denver, and the Morleys are residents and citizens of Iowa.

The Stock Yards Company was at the times mentioned in the bill engaged in building and constructing a stock yard in Sioux Falls, South Dakota, and in selling a certain amount of its capital stock for raising sufficient capital for that purpose. The Morleys, at such time, were engaged in the buying and selling of stock and especially in selling the stock of the Stock Yards Company to various farmers and other purchasers, such sales being necessary to complete the construction of the stock yard and also necessary to enable the Morleys to earn a livelihood.

Six informations were filed against appellees at the instigation of appellants for violations of the statute and it is alleged that appellees will be prosecuted immediately under such informations and will be further prosecuted.

The statute, it is alleged, is an infraction of the Fourteenth Amendment of the Constitution of the United States and imposes a burden upon and practically amounts to a prohibition of interstate commerce and hence offends the commerce clause of the Constitution of the United States; and "that it attempts to vest in and delegate to the said so-called State Securities Commission judicial powers unauthorized by law."

Against the bill appellants urge, besides asserting the validity of the statute, three defenses: (1) That com-

plainants have a plain, speedy and adequate remedy at law; (2) the suit is one against the State; (3) that the plea of the unconstitutionality of the statute was made in the criminal actions.

The three defenses are without merit. Six informations have already been filed against appellees and as many more may be brought as there may be violations of the statute, and a conviction of each may bear a fine of \$1000 or imprisonment, or both.

The suit manifestly is not one against the State, and the decree appealed from does not enjoin criminal actions commenced before the filing of the bill. We therefore pass to the merits.

A summary of the statute is all that is necessary. Its purpose as declared in its title is to prevent fraud in the sale and disposition of stocks, bonds or other securities sold or offered for sale within the State. It creates a commission called the State Securities Commission, of which the appellants—except Hanson, who is prosecuting attorney of Turner County—are members.

Those dealing in securities—and they may be persons, corporations, co-partnerships, companies or associations, incorporated or unincorporated—shall be known, it is provided, “as a domestic investment company.” Those resident of or organized in any other State, Territory or government shall be known “as a foreign investment company.”

Certain securities are exempt from the provisions of the act and information as to those to which it applies must be furnished to the commission as follows: If the securities are of the dealer's own issue a statement must be filed with the commission showing in full detail (1) the plan upon which it proposes to transact business, (2) a copy of all contracts, stocks and bonds which it proposes to make with or sell to contributors or customers, together with a copy of its prospectus and of the proposed advertisements of its

securities; which statement shall also show its name and location and main office; (3) the names and addresses of its officers and an itemized account of its financial condition and the amount of its assets and liabilities; (4) such other information as the commission may require; (5) if a foreign corporation, a copy of the law under which it was incorporated; (6) a copy of its charter and certain other papers relating to its constitution and organization. A filing fee is provided for of not less than \$10 nor more than \$100. The described papers are to be verified and, if of record, certified to. If a foreign corporation, the applicant must file its irrevocable consent to suits against it by service of summons upon the public examiner.

The commission is authorized to require further information than that mentioned above and to make an appraisal of the property of the applicant at the expense of the applicant.

If the commission find from the statements filed and the reports of the investigations conducted by it that the securities or investment contracts offered for sale would in its opinion work a fraud upon the purchaser, the commission shall disapprove of their sale and notify the company by registered mail of its findings and disapproval, and it shall be unlawful for the company to sell such securities and they shall not be sold in the State. If, however, the proposed plan of business and the securities are not of that character their sale shall be approved and a certificate issued of permission to sell.

The person who is authorized to sell the securities designated in the act is termed a "dealer" in them, and he shall not sell or offer them for sale until he shall have filed a list of the same in the office of the commission. The term "dealer," it is provided, shall not include an owner nor issuer of securities when the sale of them is not made in the course of continued and successive transactions of a similar nature, nor one who in a trust capacity created

by law lawfully sells securities "impressed with such trust." A "dealer" is required to furnish practically the same information as that required of corporations. All authorized agents of a "dealer" or investment company shall be registered with the commission and if the "dealer" be a nonresident or a corporation other than a domestic corporation he shall at the time he registers with the commission file with it a written, duly authenticated appointment of the public examiner of the State as his or its agent in the State upon whom process or pleadings may be served for or on behalf of the "dealer," which appointment shall be irrevocable. Upon compliance with the terms of the act the commission shall issue to such "dealer" a license which shall be good until revoked by the commission for good cause upon notice to the "dealer" and after a hearing duly had.

There is a provision for keeping accounts, payment of fines and other details, and it is provided that if, after permission has been issued authorizing the sale of the designated securities it shall be made to appear to the commission from an examination of an investment company that the further sale of the securities would work a fraud upon the purchaser, the commission may make an order revoking the license of the company and, pending the hearing, suspend the right of the company.

It is unlawful for a dealer or investment company to sell or offer for sale securities other than those approved by the commission or to transact business on any other plan than that set forth in the statements and papers required to be filed with the commission; or to circulate advertisements or other documents in the State differing in any way from the copy filed with the commission; or until the same has been approved by the commission. And no dealer shall sell or offer for sale securities of an investment company until such company has complied with the act. He may, however, if such investment company has not

itself complied with the act, make application for a license.

Records of the commission shall be public records and they shall be so arranged and preserved as to facilitate their examination, except that the commission may in its discretion withhold information relating to the private affairs of persons or corporations when in its judgment the same shall not be required for the public welfare, or any information relative to any matter that may be at issue in any court, unless upon an order of the court. Except as so provided the commission may furnish to those who may apply therefor any information regarding any investment company or its affairs.

Annual statements are required to be filed by investment companies, domestic or foreign, in such form and containing such information as the commission may demand; and failure to do so forfeits its permit.

The Supreme Court of the State upon petition of any person aggrieved may review by certiorari any final order or determination of the commission. The issue of the writ shall not, however, unless specifically ordered by the court, operate as a stay of proceedings.

Violations of the act are made misdemeanors punishable by a fine of not more than \$1000 or imprisonment for not more than one year, or both fine and imprisonment. And it is provided that if any section of the act be declared unconstitutional or unauthorized the other sections shall not be vacated thereby.

The statute of South Dakota differs in some details from the statute of Ohio, but in its purpose and general provisions it is the same. There is urged against it, as was urged against the Ohio statute, that it violates the Fourteenth Amendment and the commerce clause of the Constitution of the United States. The argument to support these contentions, while affluent in citation of cases, is not so circumstantial as that which is presented against

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the Michigan statute. Therefore, we shall rest this case upon our opinion in Nos. 438, 439 and 440, reserving to the Michigan case our reply to the more specific objections.

Decree reversed and cause remanded for further proceedings in conformity with this opinion.

MR. JUSTICE McREYNOLDS dissents.